

Neutral Citation No: [2019] NIQB 7

Ref: KEE10535

*Judgment: approved by the Court for handing down  
(subject to editorial corrections)\**

Delivered: 05/11/2018  
And Addendum  
30/01/2019

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (COMMERCIAL LIST)

Between:

JOHN STEWART

First-named Plaintiff;

and

JONATHAN STEWART

Second-named Plaintiff;

and

ADRIAN MARTIN

First-named Defendant;

and

ROBERT MARTIN

Second-named Defendant;

and

BARRY P FINLAY, ALAN T W REID, NIGEL G KIRKPATRICK,  
EILEEN McLARNON, AIDAN P DONNELLY AND RONALD J LOWRY  
(PRACTISING AS MURLAND SOLICITORS)

Third-named Defendants.

KEEGAN J

**Introduction**

[1] In 2007 the plaintiffs paid for redeemable preference shares in a property development company of which the first and second named defendants were directors. The consideration was £600,000 made up of £490,000 in cash and a credit of £110,000 from a previous project. The third named defendants were the solicitors acting for the company in the transaction. The plaintiffs never received the shares

and the company went into administration. The plaintiffs now claim that their money was misapplied and so they seek rescission and/or damages.

[2] The writ is dated 12 March 2013 and it sets out the plaintiffs' claims in the following terms:

- (a) Rescission of a contract between the plaintiffs and the first and second-named defendants made on or about 12 June 2007 concerning the investment of monies belonging to the plaintiff in a company called BMD Developments Ltd ("BMD") with the intention of purchasing two residential property sites at Ballygowan, Co Down, for developments, and of sharing the profits of the subsequent sale thereof, and which contract/agreement was evidenced by a letter from the fourth-named defendant addressed to the third-named defendant dated 12 June 2007 containing the terms of the said contract/agreement.
- (b) A declaration that the said contract/agreement referred to at (a) above is null, void and of no legal cause or effect.
- (c) Repayment of the sum of £600,000 being: £490,000 having been paid to the first and second-named defendants through the offices of the third-named defendants, and with the knowledge of the fourth-named defendant, on or about 6 July 2007, plus £110,000 comprising an existing liability to the plaintiff's expressly acknowledged by the first and second-named defendants, and/or each of them, arising from the sale of the apartment at Cedar View, Upper Knockbreda Road, Belfast, in or about March 2007.
- (d) Further and/or in the alternative, damages being loss and damages sustained by the plaintiffs by reason of:
  - (i) the breach of fiduciary duty of, conversion and the dishonest acquisition and use of the plaintiffs' monies by the first and second named defendants in their personal capacity, and as Directors of BMD, and further and/or in the alternative, by reason of the misrepresentation, negligent mis-statement, breach of contract, breach of condition, breach of warranty, and conversion of/by the first and second-named defendants in and about the obtaining an use of the plaintiffs money; and/or
  - (ii) the dishonest assistance of the third-named defendants as solicitors acting on behalf of BMD and its Directors, the first and second-named defendants rendering the third-named defendants personally liable for the amounts paid over by the plaintiffs to the first and second-named defendants as Directors of BMD, and further and/or in the alternative acting as solicitors to the plaintiffs as intended redeemable preference shares at BMD, for whom the third-named defendants acted, or

alternatively acting as the plaintiffs' agents for the purpose of paying over the monies to the Directors of BMD in accordance with the terms of the contract/agreement made on or about 12 June 2007, or alternatively holding the monies as trustee on trust for the plaintiffs to be paid over to the first and second-named defendants only in accordance with the terms of the said trust; further or in the alternative the negligence, and/or breach of contract, breach of condition, breach of warranty, and/or breach of retainer of the third-named defendants and/or

- (iii) the negligence of and/or the dishonest acquisition and use of the plaintiffs' monies by the fourth-named defendant.
- (e) Interest thereon at a rate of 8% per annum until judgment or sooner payment, in accordance with Section 33A of the Judicature (Northern Ireland) Act 1978.
- (f) Such further and other relief as to the court as appropriate.
- (g) Costs.

[3] The plaintiffs set out the alleged misrepresentations/negligent misstatement of the first and second defendants in the statement of claim as follows:

"77(a) Misrepresenting to the plaintiffs that BMD represented a more convenient special purpose vehicle by which to conduct the purchase of sites at Ballygowan, when, in truth, BMD had other property acquisitions that required to be funded, and that, by investing in the company, the directors could misapply the funds for their own purpose

(b) Misrepresenting through words to the first and second named plaintiff that the monies would be applied solely for the purchase of sites at Ballygowan site 1 and site 2, when it was known or intended by them that this would not be the case

(c) Misrepresenting to the plaintiffs that there was, in fact, an agreed purchase price in relation to Ballygowan sites 1 and 2, when this was not so

(d) Misrepresenting through conduct that the monies were being held by BMD until the purchase of the Ballygowan sites 1 and 2 could proceed:

- (i) That the first named defendant had agreed a purchase price with Ballygowan First Presbyterian Church for the purchase of two sites of their land at Ballygowan.
- (ii) That the plaintiffs and the defendants would invest jointly with their own money in the purchase of these sites and, thereafter, share in the profits following the development of the sites.
- (iii) That their individual contributions were at such a level that a third person, namely the second named defendant has to be brought in to invest capital into the project.
- (iv) That BMD offered a better company vehicle for the purchase of the sites than the company specifically created by the first named plaintiff and the first named defendant, given that the second named plaintiff was also a director of the said company.
- (v) That the monies paid by the plaintiffs to the defendants would be applied solely to the purchase of the sites at Ballygowan.
- (vi) The second named defendants conduct by representing through conduct that he was an actual investor alongside the first named defendant in the purchase of the sites at Ballygowan."

[4] The first-named plaintiff is a retired businessman who was involved in the import and sale of sewing machines. The second-named plaintiff is a plumber and the son of the first named plaintiff. The first defendant is now unemployed but he was a property developer when involved with the plaintiffs. The second-named defendant is the uncle of the first-named defendant who assisted with the property development. He is an elderly man who played no active part in these proceedings. The case was therefore defended by the first defendant as far as the property development company is concerned. The third-named defendant is a firm of solicitors who acted for the developers and by whom Mr Nigel Kirkpatrick was employed. The fourth defendant is an accountant who also acted in relation to the property deals. This defendant was released from the proceedings at an early stage.

[5] Mr O'Donoghue QC appeared with Mr McCracken for the first and second-named plaintiffs. Mr Orr QC appeared with Mr Coyle for the first-named

defendant. Mr Ringland QC appeared with Mr Jonathan Dunlop for the third-named defendants.

[6] The case began before me in February 2017 when it was opened in detail by Mr O'Donoghue QC and the first-named plaintiff was called. During the course of cross-examination of the first plaintiff by Mr Ringland an issue arose in that the plaintiff became uncomfortable and after failing to answer a number of questions he said that he had some brain shrinkage and was being treated for dementia. As a result of this development the case had to be adjourned and medical evidence was obtained. Ultimately, the medical reports revealed that the plaintiff had received some medical treatment however there was consensus among counsel that Mr Stewart was competent and that the case could resume. It was agreed that the plaintiff's evidence in chief would stand as evidence in the case and not be repeated however the cross-examination started afresh when the case resumed in December 2017.

[7] I heard evidence from the first and second-named plaintiffs. I also heard evidence from the first defendant and Mr Kirkpatrick. Counsel provided helpful written arguments and an agreed chronology of events.

[8] The background to the case starts in 2005 at a time of prosperity. A company was set up by the first-named defendant called BMD Developments ("BMD"). The directors of this were the two Martins, the first and second-named defendant. Mr Kirkpatrick as solicitor and Mr Lowry as accountant were involved in a professional capacity on behalf of BMD. Mr Stewart and his son decided to invest in this company and as a result they became shareholders in BMD. They raised £490,000 by way of re-mortgaging and they were also to be credited £110,000 from a previous enterprise. So the total at issue in this case is some £600,000.

[9] The plaintiffs had retained solicitors, McCoubrey Hinds, who acted for them and facilitated the money transfer of £490,000. The case comes down to what the money was for. The plaintiffs say it was to be applied to a development called Ballygowan to allow them to share in the profit of that. Ultimately, the money was applied to another development called Kingsway by way of funding a related house purchase at Gilnahirk. The Ulster Bank foreclosed relatively shortly after this investment process in and about 2008 and so by the time the plaintiffs sought their money back the company was in administration. This is but a brief summary of the facts in the case. There are a number of factual disputes which I will come to but in essence there are really four core questions for determination:

- (i) What did the plaintiffs actually invest in?
- (ii) What duties were owed by the respective defendants to the plaintiffs?
- (iii) If duties were owed were they breached?

(iv) Was there a trust which was breached/dishonest assistance in relation to this?

I now turn to the chronology which was provided and some of the correspondence which has been referred to as this provides the context to events.

[10] I replicate the chronology which has been provided by the parties as follows:

<b>Date</b>	<b>Event/Document</b>
15/04/2005	Certificate of Incorporation of BMD Developments Ltd (BMD).
17/08/2005	Original G98(2) (Return of Allotment of Shares) recording the issue of 99 Ordinary Shares to Adrian and Robert Martin (stamped post received 7th September 2005 by Companies Registry).
18/08/2006	All monies charge in favour of Ulster Bank over BMD's assets.
09/10/2006	BMD lodge Directors' report and financial statements with Companies Registry for year ended 31st December 2005 and 2006.
05/12/2006	Letter JL Grant and Co (Lowry Grant) to the First Named Plaintiff (John Stewart) enclosing HMRC authorisation form (64-8). Authorisation form at B1/258-260 relates to Stewart Martin Development Ltd (see B1/260).
14/12/2006	Letter of Eric Cairns Partnership to Nigel Kirkpatrick of JMurland & Co, whose client is described as 'Stewart And Martin Developments (Mr Adrian Martin)' advising that the Vendor has agreed, subject to congregational approval, the sale of lands at Comber Road Ballygowan. Document contains handwriting of Nigel Kirkpatrick dated 17 <sup>th</sup> December 2006 following attendance with Adrian Martin.
22/12/2006	Letter of Lowry Grant to Adrian Martin in relation to Stewart Martin Developments (NI) Ltd.
01/05/2007	Letter of Templeton Robinson to James Boston & Sullivan re 62 Gilnahirk Road, Belfast confirming agreement of property for sale to Mr Martin, subject to contract for £410,000 cash.
16/05/2007	Attendance Note of Nigel Kirkpatrick with Adrian Martin relating to Nos. 49 to 53 Kingsway and 62 Gilnahirk Road. Typed version of attendance note is at 992. Handwritten version at 993.

- 06/06/2007 Attendance note of Nigel Kirkpatrick with Adrian Martin referring to John Stewart, Ballygowan site and Lowry Grant.
- 12/06/2007 Letter to Nigel Kirkpatrick from Lowry Grant recording that a meeting had taken place with Lowry Grant, as Accountants for BMD, with Robert Martin, Adrian Martin and Johnny Stewart. Letter records the purpose was to discuss their investments in BMD Developments, and in particular the development of sites at Ballygowan 1 and 2. Letter thereafter sets out structure of funding and return that was agreed.
- 12/06/2007 Letter to Billy McCoubrey of McCoubrey-Hinds Solicitors from Lowry Grant in identical terms to the letter to Nigel Kirkpatrick.
- 14/06/2007 Meeting at Murlands between Nigel Kirkpatrick, Adrian Martin, Robert Martin, John Stewart and Jonathan Stewart. There is no written record of the content of this meeting.
- 19/06/2007 Attendance note of Nigel Kirkpatrick with Claire Savage of Ulster Bank in relation to the arranging of a facility of £1.7m for Gilnahirk.
- 19/06/2007 Letter of John McKee & Son (acting for Ulster Bank) to Nigel Kirkpatrick at J Murland & Co in relation to Borrowing Facilities relating to Nos. 49 to 53 Kingsway Park.
- 19/06/2007 Email John Stewart to Billy McCoubrey of McCoubrey-Hinds setting out breakdown of money needed and its provenance.
- 20/06/2007 Letter of Nigel Kirkpatrick to Des Palmer of the Company Shop enclosing copy of letter of 12<sup>th</sup> June 2007 from Lowry Grant and BMD's Memorandum and Articles of Association.
- 22/06/2007 Minutes of a meeting of the members of BMD stamped 'counter received' on 22nd August 2007 by Companies Registry.
- 22/06/2007 Revised G 98(2) of BMD dated 22<sup>nd</sup> June 2007, recording issue of 1.8 million redeemable preferential shares.
- 22/06/2007 First version of G133 (Notice of Increase in Nominal Capital) by BMD gave notice, in accordance with Article 133 of the Companies (NI) Order 1986, that the nominal capital of the Company had been increased by £1.8 million beyond the registered capital of £100,000. This version was subsequently updated in August 2007.

25/06/2007 Letter of Nigel Kirkpatrick to Alison Reid of John McKee & Son in relation to Nos. 49 to 53 Kingsway Park and also enquiring if the Bank required security in relation to No. 62 Gilnahirk Road.

26/06/2007 Letter of John McKee to Murlands relating to Nos. 49 to 53 Kingsway Park, Belfast.

27/06/2007 Letter of James Boston & Sullivan to Murlands enclosing copy accepted contract re 62 Gilnahirk Road.

28/06/2007 Letter of Murlands to John McKee relating to Nos. 49 to 53 Kingsway Park and advising that the sum of £1,278,885.00 was required of the Bank. The breakdown of that sum is at 1660.

03/07/2007 Letter of McCoubrey-Hinds to John Stewart relating to the purchase of shares in BMD and advising that they were acting purely on instructions to forward funds to J Murland & Co and not as legal representatives in respect of the proposed purchase of the shares. Advising also that they could not be responsible for any prejudice arising due to the absence of standard documentation and appropriate investigations. Letter signed by John Stewart.

05/07/2007 Letter of Nigel Kirkpatrick to McCoubrey-Hinds enclosing G133 and G98(2) in relation to the allotment of redeemable preference shares.

05/07/2007 Letter of Nigel Kirkpatrick to Des Palmer at the Company Shop advising that the allotment of the Preference Shares was to be specifically in relation to the acquisition and development of two building sites described as Ballygowan 1 and 2.

05/07/2007 Letter of Nigel Kirkpatrick to Alison Reid at John McKee & Son, sent by fax (1721A) and post (1721B) asking for confirmation that funds for the purchase of No. 62 Gilnahirk Road including stamp duty of £12,300 would be provided by the Ulster Bank in addition to the amounts required in relation to the Kingsway Park properties as set out in the letter of 28<sup>th</sup> June 2007.

05/07/2007 Completion letter of Murlands to James Boston & Sullivan forwarding cheque for purchase, not to be encashed without express permission, re 62 Gilnahirk Road, Belfast.

05/07/2007 Completion letter of Murlands to McConnell Kelly & Co forwarding cheque for purchase, not to be encashed without



express permission, re 53 Kingsway Park, Belfast.

- 06/07/2007 Letter of John McKee & Sons to Murlands relating to Nos. 49 to 53 and No. 62 Gilnahirk Road. Letter advised that the borrowing facility was £1.26 million, subject to a number of conditions, including a requirement to lodge a deed of transfer in favour of BMD in relation to No. 62 Gilnahirk Road Belfast.
- 06/07/2007 Letter of Murlands to John McKee & Son accepting the offer following several emails and telephone discussions.
- 06/07/2007 Letter of McCoubrey-Hinds to Murlands describing Robert and Adrian Martin as Murlands' clients and John and Jonathan Stewart as McCoubrey-Hinds' clients. The letter stated that they had authorised a CHAPS transfer in the sum of £490,000 to Murlands' clients account, subject to the heads of agreement set out in the letter to McCoubrey-Hinds' office dated 12<sup>th</sup> June 2007 of Lowry Grant. Asked to receive the redeemable preference shares in their clients' name at Murlands' earliest convenience.
- 06/07/2007 Same letter is faxed to Murlands' Ballynahinch Office at 11.27am.
- 06/07/2007 Letter of Holmes & Moffitt to Murlands re 51 Kingsway Park, Belfast, confirming receipt of client's offer to purchase, and seeking outstanding agreements and evidence of title.
- 10/07/2007 Assignment - Graham to BMD re 53 Kingsway Park, Belfast.
- 19/07/2007 Letter of McConnell Kelly to Murlands re 53 Kingsway Park, Belfast, requesting cheque for interest payable on the purchase monies in accordance with a Notice to Complete dated 2nd July 2007, and cheque in respect of bills of costs therein in accordance with the terms of the Contract.
- 24/07/2007 Letter of John Boston & Co to Murlands enclosing bill of costs in draft form, re 49 Kingsway Park, Belfast.
- 24/07/2007 Draft Bill of Costs of John Boston & Co. re Sale of 49 Kingsway Park, Belfast.
- 30/07/2007 Letter of John Boston & Co to Murlands indicating purchase price of £503,000 if money received next day, otherwise price increased etc, re 49 Kingsway Park, Belfast.
- 01/08/2007 Special Conditions proposed to be inserted in the Contract re

51 Kingsway Park, Belfast - 'Long to Adrian Martin of BMD'.

03/08/2007 Assignment - Rogan to BMD re 49 Kingsway Park, Belfast.

06/08/2007 Assignment - Long to BMD re 51 Kingsway Park, Belfast.

17/08/2007 All monies charge held over all assets of BMD in favour of Ulster Bank.

22/08/2007 Amended G133 now showing the redemption rights of the shares (i) to (v) inclusive.

22/08/2007 BMD's Memorandum of Association showing paragraph 5 referring to share capital as £1.9 million comprising 100,000 ordinary shares and 1.8 million redeemable preference shares.

22/08/2007 BMD's Articles of Association showing, at paragraph 4(b)(i) to (v) redemption rights in relation to the redeemable preference shares.

10/10/2007 Letter of Michael Harrison, Hewitt & Gilpin (acting on behalf of the Church in relation to the sale of Ballygowan 1) writes to Murlands with draft contract and evidence of title.

18/10/2007 Letter of Michael Harrison of Hewitt & Gilpin to Nigel Kirkpatrick re the need for a restrictive covenant in terms of future use of the premises.

22/10/2007 Letter of Nigel Kirkpatrick to Hewitt & Gilpin returning receipted schedule of copy title together with NIE Wayleave map.

24/10/2007 Letter of Hewitt & Gilpin to Murlands enclosing searches, and awaiting offer to purchase.

25/10/2007 Murland's client (BMD) ledger showing in detail how the £490,000 was used, re 62 Gilnahirk Road, Belfast.

25/10/2007 Bill of Costs of Murlands addressed to GEM Construction Limited re 62 Gilnahirk Road, Belfast including Reconciliation Account.

31/10/2007 Letter of Hewitt & Gilpin to Murlands enclosing Property Certificates, and awaiting offer to purchase by return.

21/11/2007 Letter of Hewitt & Gilpin to Murlands advising offer still not

received. Asks that contract be returned by 22<sup>nd</sup> November 2007 with a view to completion a fortnight later.

- 26/11/2007 Letter of Murlands to Hewitt & Gilpin advising that client's instructions are being taken.
- 29/11/2007 Letter of Hewitt & Gilpin to Murlands advising that Adrian Martin spoke to Church Agent and informed that the contract would be signed within the next ten days with a view to completion two weeks thereafter.
- 07/12/2007 Letter of Murlands to Hewitt & Gilpin explaining that the offer of £1.9 million was strictly conditional upon the density of his planning application not being affected by reason of the Church's decision late in negotiations to retain its secondary entrance to its retained premises. Offer reduced from £1.9m to £1.7m.
- 18/01/2008 Revised offer of £1.7m accepted.
- 25/01/2008 Letter of Murlands to Hewitt & Gilpin advising that they are seeking instructions.
- 05/03/2008 Letter of Murlands to Hewitt & Gilpin recording that planning application was submitted in June 2007 and recording that Adrian Martin is willing to enter into a conditional contract.
- 07/07/2008 Directors' report and financial statements for Y/E 31 December 2007 for BMD; Balance sheet at 318.
- 13/10/2008 Email/letter John Stewart to Adrian Martin giving notice that he and his son wished to encash their redeemable preference shares.
- 15/10/2008 First version of Lowry Grant's letter recording the outcome of the meeting of 15 October 2008.
- 15/10/2008 Second version of Lowry Grant's letter recording the outcome of the meeting of 15 October 2008.
- 15/10/2008 Email of Lowry Grant to John Stewart.
- 16/10/2008 Email of Lowry Grant to John Stewart attaching second version of Lowry Grant's letter.
- 16/10/2008 Email of Lowry Grant to John Stewart advising that he is happy

to meet with John Stewart and any of his advisors in order to make clear the agreement between him and Adrian/Robert Martin.

- 21/10/2008 Email of John Stewart to Lowry Grant recording that he had been speaking to Adrian/Robert Martin and that they were going to give him a letter from the solicitor in the form of underwriting for the £600,000.
- 03/12/2008 Letter of James B Kennedy, Chartered Accountant, to BMD requesting answers to a number of queries.
- 12/12/2008 Letter of Lowry Grant to James B Kennedy & Co answering the points in the letter.
- 19/12/2008 Letter of James B Kennedy to BMD advising that Mr Stewart is to instruct a solicitor.
- 29/04/2009 First letter of claim forwarded by MKB Russells to Murlands, asking Murlands to account for the Stewart monies.
- 29/04/2009 Letters of claim forwarded by MKB Russells to Adrian Martin and Robert Martin respectively.
- 07/05/2009 Meeting at Lowry Grant's office at which Lowry Grant, Nigel Kirkpatrick, Adrian Martin and Robert Martin attend.
- 22/05/2009 Memorandum and Articles of Association re-submitted to Company Registry by Murlands, para.5 at p.431, and para. 4, at p.432.
- 05/06/2009 Letter of DETI Companies Registry to Murlands, indicating that the re-submitted Memorandum and Articles of Association of BMD had been received, but indicating that they must be signed on the 1st page a true certified copy by a serving company director.
- 25/06/2009 Letter of Murlands to MKB Russell answering letter of claim issued to Murlands and to BMD.
- 02/07/2009 Response by MKB Russell to Murlands' letter.
- 22/08/2009 Letter of DETI Companies Registry to Murlands, indicating that the re-submitted Memo and Articles of Association of BMD could not be accepted, and requiring that they be certified and signed as a true copy.

01/09/2009	Print out of BMD Account with J Murland & Co re purchase of Nos.49,51 & 53 Kingsway Park.
01/09/2009	Letter of Nigel Kirkpatrick to Companies Registry returning duly amended and certified Memorandum and Articles of Association of BMD Developments Ltd.
15/03/2010	Minutes of Meeting with Lowry Grant, Jonny Stewart, Beth Stewart, John Stewart.
28/06/2010	Letter of John Stewart to Mr BP Finlay Murlands Solicitors.
06/09/2010	Letter of John and Jonathan Stewart to Ms M Grant.
06/01/2011	Letter of Mrs M Grant to Messrs Stewart.
21/01/2011	Letter of the Directors Disqualification Unit of the DETI NI (Insolvency Service) to Murlands asking for details of the £490,000 transferred.
28/01/2011	Letter of Murlands to DETI Insolvency Service giving explanation and enclosing letter of Lowry Grant of 12 June 2007, stamped received on 31st January 2011.
23/02/2011	Further letter of the Directors Disqualification Unit of the DETI to Murlands asking for clarification.
07/04/2011	Further response from Murlands addressed to DETI Insolvency Service.
21/10/2011	Transcript of Nigel Kirkpatrick's police interview.
11/09/2012	Second letter of claim (CMG Solicitors) on behalf the Stewarts addressed to Murlands.
Undated	Handwritten estimated costings for townhouses and/or apartments.
Undated	Unsigned typed police statement of John Stewart.
Undated	Cash Statement re John Stewart and Anne Elizabeth Stewart.
Undated	Undated document handwritten by Nigel Kirkpatrick showing a breakdown of £1.7 million.

## The Evidence

[11] Mr Stewart senior gave evidence in support of his case. He is 62 years of age and he described his background in business which was successful refurbishing and selling sewing machines. This involved international trade. Mr Stewart senior said that he had two children one of whom was the second plaintiff. This witness described the history of meeting Mr Adrian Martin in the following terms. He said that he met him in a café called Jade's Café on the Shankill Road. He said that he was introduced through the owner of the café Geordie Crossett. Mr Stewart senior explained that he frequented this café and one day in and about 2006 Mr Crossett asked whether or not he would be interested in buying property because he said he knew a man who was selling property.

[12] The witness went on to describe meeting Mr Adrian Martin who was the property developer in question. He said that he met him in and around October or November 2006. He said that a conversation ensued about a development called Cedarview which was off the Knock dual carriageway in Belfast. The discussion was about buying a flat in that development. The plaintiff said that he was promised a top floor 3-bedroom flat for a price of approximately £170,000 and that this was agreed in principle. There was no signing of documents or formal exchange of terms but he said it was an oral agreement. The witness said that Mr Crossett the café owner was also getting a flat in this development.

[13] The witness gave evidence that Mr Crossett subsequently told him that Mr Martin said that he had something better than Cedarview. The plaintiff confirmed that he was contacted by Mr Martin about this new development which he said was called Ballygowan. He described it as a development of property owned by the Presbyterian Church. This witness recalled that when Mr Martin first started talking about it the price was somewhere in the region of £900,000 and the suggestion was that he would go and speak to Lowry Grant, an accountant, who worked for Mr Martin about this. The witness gave evidence that he went and saw the site, he met Mr Grant and that he and Mr Martin agreed to set up a development company called Stewart Martin Developments. The witness thought that he did sign something but no money exchanged hands at this stage.

[14] The witness then gave evidence that in or about March 2007 Mr Martin approached him and said "I have good news and I have bad news for you." The bad news was that there was no Cedarview development property for the plaintiff because Mr Martin said "the Corrs bought the lot". However, the witness gave evidence that Mr Martin said that he made £110,000 from the flat that was promised to him. The witness then said that the conversation turned to Ballygowan and that Mr Martin said "the Lord has put us together" in relation to that. He said that a broad agreement was formed between the parties that that they would get together in relation to that development. The witness gave evidence that the investment needed for Ballygowan was £600,000 so on the basis of the £110,000 credit from

Cedarview the balance was needed in cash. This witness explained that he went to the site and looked at it and he got his son involved as he was plumber and there was an agreement that they would put the money up together.

[15] The witness then recalled that he met with Lowry Grant the accountant and he attended a meeting on 12 June 2007 in relation to the terms of this investment. He also gave evidence that on 14 June 2007 he was asked by Mr Martin to meet at Cedarview and Mr Martin then suggested that they go up the solicitors Murlands. The witness said that this was clearly on Mr Martin's initiative. The witness described that when they went into the solicitor's office Mr Martin went on into the solicitor whilst Mr Stewart and his son waited in the reception. He said it was a "jolly" meeting. The witness said that this meeting was dictated by Mr Kirkpatrick. He said that he spoke about the Ballygowan project and that Mr Kirkpatrick represented as follows. Firstly, that he needed to put his money in as there were other bidders and he could lose out on the investment. Secondly, that he would look after the McCoubreys. Thirdly, that he would become his solicitor on receipt of the monies.

[16] Mr Stewart explained that in and around June 2007 he visited another development called Kingsway. He said this was the first time he had been there and he met a man called Mr Long who was going to be selling his house for development. He said Mr Martin asked him about investing in this development but he said he was not investing there.

[17] The witness then said that he did send the £490,000 to Murlands solicitors after re-mortgaging property along with his son. He explained that the money was sent via McCoubrey Hinds solicitors. After this transaction the witness said that he continually asked for some documentation, in particular share certificates, but he did not get any. He said that in October 2007 after asking Mr Martin a number of times for documentation he was given two bits of paper in a coffee shop off the Cregagh Road which he thought amounted to share forms. The witness then said that he was invited by Mr Martin to lunch at Christmas in 2007 and there were no issues. He described a cordial relationship at this time. He said that there was some discussion of Ballygowan and he was aware that there were planning issues holding it up. He then explained that during a visit in a car to the Kingsway site in 2008 Mr Martin said something along the lines of "your money bought those houses." This referred to the Kingsway development. As a result of this Mr Stewart senior said that he asked for his money back.

[18] The witness then gave evidence about a meeting at Lowry Grant's, accountants, on 15 October 2008. This witness was clear that he did not agree the terms that were set out by Mr Grant at that meeting and he asked that the note of the meeting be changed to indicate that he was in attendance only. After that he said that he went to the Martins house. He asked to speak to Mr Martin and when he did he explained that he did not get much information from him. He stated in evidence that he also asked to speak to Mr Kirkpatrick but his request was refused. The

Subsequent to this proceedings were issued. The witness gave evidence that his first solicitor did not pursue the case and thereafter he issued proceedings through his current solicitors.

[19] When cross-examined Mr Stewart senior agreed with Mr Orr that there was nothing in writing about the various transactions described between Mr Stewart and Mr Martin. He agreed that he did not know Mr Martin before or being introduced to him by the café owner. He agreed that no legal bills have been paid to Murlands solicitors. Under cross-examination the witness disputed that he was aware that his money was being used for the Kingsway development. He also disputed that Mr Kirkpatrick told him that he should get independent legal advice. He agreed under cross-examination that mention was made between him and Mr Martin that they were members of the Orange Order and that they would buy properties together. When asked by Mr Ringland about his medical condition he said that he had had a change of medication since February so that he was all right.

[20] Mr Stewart senior said that the meeting on 12 June 2007 was friendly but he could not recall the exact details. He could not say that Mr Kirkpatrick read out the letter of 12 June 2007. He was adamant that Mr Kirkpatrick said when the money was handed over he would become his client. The witness could not explain why this was not in the pleading of the case and had been mentioned for the first time in evidence. The witness did not accept the proposition that Mr Kirkpatrick said he could not represent him and that he should get his own representation. He agreed that Mr Martin was clearly saying that "everyone trusted each other" at the meeting. Under cross-examination this witness accepted that he had his own solicitor and that a strong warning had been given by Mr McCoubrey in relation to this transaction. He understood this to be that due diligence has not been completed and that there was no formal shareholders agreement. The witnesses confirmed that he chose not to accept the solicitor's advice.

[21] The second witness who gave evidence was Mr Stewart junior. He explained that he is a self-employed plumber, 41 years of age with four children. He explained that his involvement in the investment associated with this case really began in 2007. He confirmed that he was asked to invest by his father and so he decided to re-mortgage his house. This witness said that at the time he was earning between £18,000 and £20,000 a year from plumbing and he had rent from one property of £300 to £400 a month. He said that he was excited by the prospect of the investment given the property boom and he thought that it was a great opportunity for him to get some plumbing work as well. He said he did not know the Martins before this. He explained in evidence that his father was healthy at the time when he decided to become involved in this investment. He described him as someone who had done very well with his own business, travelled the world, and had a very content life.

[22] This witness gave evidence that the investment was in relation to the Ballygowan development and that he did visit the site with his wife and children. He said that he had never visited the Kingsway site. The witness said that the



proposal was that he would invest and by his investment have an interest in the townhouses and homes which formed part of Ballygowan 1 and Ballygowan 2.

[23] The witness also gave evidence about the events of 14 June 2007. He said he was at the meeting that day. He said he was working but he had cancelled work and met with his father and drove up to Cedarview. He said that the two Martins were at the site. He said Adrian Martin said "let's go to the solicitor to move this along", so they got into the cars and drove to Murlands. He said that they went into the office and two Martins went in to see the solicitor first. He said that he sat with his father in the reception and then he was asked to come in. He said that Adrian Martin introduced them, they sat down and they got on to the topic. He said that the solicitor Mr Kirkpatrick was reading from a sheet of paper and he thought he read out the heads of agreement from the Lowry Grant letter. The witness said he understood that to be Ballygowan 1 and Ballygowan 2 and the shares were a third, a third, a sixth, a sixth.

[24] This witness said that he was under no illusion that Mr Kirkpatrick was acting on his behalf once the money was transferred over. He said that was because it was said in the office that he would become a client on transfer. The witness said that is the way he left the office. The witness accepted that he was not present at the 12 June 2007 meeting with Lowry Grant and so he did not have a copy of the heads of agreement document or an exact understanding of the share transaction at the time.

[25] This witness confirmed that after that meeting in June 2007 his father mentioned the Kingsway development. He said that his father said something about Adrian Martin letting him into another investment, but he told his father that he did not want to get involved as he was struggling to get the Ballygowan money and he did not want to have to borrow any more money. He said that was the first that he heard of it.

[26] This witness was not involved in the October 2008 meeting. He said that at the June 2007 meeting the solicitor was saying that the money needed to be gathered as the deal could be lost because there was another bidder. The witness said that he was in a solicitor's office maybe four times in his life maximum and he trusted Mr Kirkpatrick to undertake the transaction. As regards visiting Kingsway or any of the meetings after 14 June he said that they all involved his father and he left matters to him.

[27] This witness was clear in his evidence that Gilnahirk was never mentioned to him. He explained that it was only after the event that having looked at the documents with his wife he discovered that there was a fraud perpetrated on him and his father. He explained that he also attended at Adrian Martin's house when David Cairns the estate agent was there. He said that there was supposed to be a meeting but there was no attendance by the solicitor or the Martins. He said that as a result of that he drove with his father to Adrian's house and met him there. At that

stage he was asking for his money back but nothing came of it. Finally, this witness referred to the loss of a substantial sum of money and the effect upon him.

[28] Under cross-examination this witness agreed that his father had been the dominant partner in the investment and it was his father who had most contact with Mr Martin. This witness said that he attended two meetings with Adrian Martin and Murlands i.e the main meeting in June 2007 and a short meeting thereafter. At the latter meeting he said that nothing really happened because there was no discussion. The witness agreed that he had a more limited involvement than his father. He also agreed that he did not pay money personally to Mr Martin at any time. He accepted that the money was paid to the company. He agreed that the correspondence from McCoubreys represented a clear warning about proceeding with the investment due to the absence of checks and formalities. He accepted that this advice was not followed. He also agreed under cross-examination that he did not actually see Mr Kirkpatrick read from the 12 June correspondence at the meeting. However, he said that Mr Kirkpatrick really covered all of the issues outlined in that letter. This witness also disputed that he was told to see his own solicitor.

[29] The next witness called on behalf of the plaintiffs was Mrs Beth Stewart. She is the wife of Mr Stewart junior. In evidence she confirmed that she had no active involvement in the investment. She said that she was aware that her husband was re-mortgaging and she took a drive with him once to the Ballygowan lands. However, she said that she had had no other involvement with Mr Martin and she was not present at any of the relevant meetings. She said in evidence that she became involved in January 2010 when her father and husband said that the Crown Solicitors were not taking the case any further. She therefore undertook some investigations herself and she said that alarm bells began to ring. She explained that this led to a complaint being made to police and a search for various documents including share certificates and documents which dealt with the articles of association and memorandum of agreement of the company.

[30] When this witness was about to give evidence about various company documents an objection was raised because a matter was not pleaded in relation to correction of these documents. I allowed some time for counsel to take instructions and Mr O'Donoghue agreed that he would not lead that evidence and so this witness was not cross-examined. Mr O'Donoghue also indicated that he did not intend to call Mr Farris who was retained as an expert witness in this case and so the plaintiffs' case rested on the evidence of Mr Stewart senior and Mr Stewart junior.

[31] Evidence was then called by Mr Orr from Mr Adrian Martin. Mr Martin explained that he was currently unemployed. However, he said that he had been in the building trade since leaving school and he worked alongside his uncle in relation to developing property largely in south and east Belfast. He said that he had two companies namely GEM and BMD. He said that GEM was the heart of everything and employed the men who worked for him. He said that company was involved in the day to day running of the business. He said that BMD dealt with accountancy

and tax and borrowing and sub-contracted to GEM to do the building work. The witness said that he had no qualifications.

[32] The witness explained that in 2006 he and his uncle were involved in a project called Cedarview. He said he was approached by a man called Geordie in a café on the Shankill Road and they had a conversation about investing “in this and that”. He said this led to an introduction to Mr Stewart senior. The witness explained that he then met Mr Stewart senior, he came to the Cedarview site and he was interested in investing in it. The witness said that he did not buy into the site and lots of people were enquiring about it in those days given that the buy to let market was strong and such sites were inundated with interest. He also said there was no pressure in relation to the development. He said that Mr Stewart senior provisionally agreed to invest in one apartment. However, he explained that this never came to pass as various other people offered money for the full site.

[33] The witness then confirmed that in 2006 Mr Stewart senior displayed an interest in another development at Ballygowan. The witness was insistent that this was Ballygowan 1 and that Ballygowan 2 was very far down the line and was only “a discussion”. However, he said that he took Mr Stewart senior to see Ballygowan 1. He said that Eric Cairns, estate agent was selling this site for the Presbyterian Church and that he was the highest bidder. However, the witness referred to what he described as rumblings that the parishioners were unhappy due to the issue of the entrance to the site and so that was delaying matters. The witness said that Mr Stewart senior said that he was willing to invest in any event and that “he had half a million spare to do that.” The witness made the point that this was at the top of the market when many people were getting involved in property development. He said there was not much else discussed or anything put in writing at this stage.

[34] The witness explained that as the Ballygowan development was not immediate there was another development at Kingsway, Gilnahirk which Mr Stewart was told about. He described a visit to Mr Long’s house. He stated that the plan was to buy three properties in this area and as part of the deal one of the vendors (Mr Long) would get an alternative house. The witness gave evidence about a meeting where Mr Stewart was in the back garden of the property. As a result of this he said that there was an agreement in principle about this development proceeding with Mr Stewart senior’s money being used as a deposit and borrowing for the rest.

[35] This witness then gave evidence about the meeting on 12 June 2007. He said this was a meeting where “he was getting the suits to decide how to put together the deal”. He said the one thing that he was sure of was that Mr Stewart would have no say in anything other than what he invested in. He said that only Gilnahirk was discussed. He said that that is why the deposit was paid to Murlands and the money was used towards the Gilnahirk project. The witness then explained that the bank foreclosed on Gilnahirk and as a result the development did not proceed.

[36] The witness described having a good relationship with Mr Stewart senior. In particular he recounted that there was conversation about land owned by the Orange Order that they would collectively try to develop. The witness accepted that Mr Stewart senior brought up the lack of paperwork and he said that he was at fault about that. This witness said that he had no real understanding of the paperwork and he had not actually opened the envelope in which the letter from Lowry Grant of June 2017 was contained. He said when he did he went to get it corrected and that was the meeting in October 2008 which resulted in revised terms.

[37] The witness then stated that whenever the bank foreclosed he said it was like this for everyone. He said that "the banks were gone, everyone ran for cover and Mr Stewart senior was no exception." He said there was a discussion at his house in 2009 and that resulted in a short meeting when everyone went to Murlands but nothing really came of that. He said in evidence that he had never promised that he would give an undertaking to pay the money back. He also confirmed that he had been interviewed by the police.

[38] When under cross-examination the witness denied that this was all "a con trap." He said that life was great at the time when all of this took place as there was no shortage of money or opportunities. He also refused to accept the suggestion that either Mr Grant or Mr Kirkpatrick had been dishonest. He made the case that he was not great with the paperwork but Mr Stewart senior had noticed mistakes on it and then the paperwork was properly revised to Gilnahirk alone. Under cross-examination this witness accepted that he had decided of his own volition to bring the Stewarts to Murlands on 14 June 2007. He accepted under cross-examination that the solicitor said that he could not meet him and the Stewarts and advise them both. However, he said that he went on ahead because "everyone was on the same page." He agreed under cross-examination that Mr Kirkpatrick was irritated and he accepted the point that he had said that the Stewarts "needed to get legal" from someone else.

[39] The witness did not have a clear recollection of exactly what was said or discussed by Mr Kirkpatrick at the meeting. However, he said in evidence that he assumed that Gilnahirk was mentioned because that was what they were there for. He could not recall whether the 12 June 2007 letter was referenced. Under cross-examination by Mr O'Donoghue the witness accepted that one point of agreement was that the money was paid over. It was put to the witness that this was for a specific purpose and a specific property.

[40] The witness did not accept the proposition put to him that Mr Stewart senior had invested in the Cedarview development and was owed £110,000. He made the point that he had not put a penny down and this suggestion was incorrect. When asked about the setting up S & M Developments the witness said that his uncle wanted out because he was retiring so rather than the Stewarts joining BMD initially the S & M Developments was set up to facilitate any development. However, he

said this was effectively kept on the shelf pending a development actually taking shape. This witness said that Gilnahirk was clearly on the agenda and that there were various visits to the site. It was put to the witness that the development under offer in the correspondence was clearly Ballygowan rather than Gilnahirk.

[41] During his evidence when various documents were put to this witness he said he had difficulty reading, recollecting or understanding. The thrust of the evidence given by this witness was that they had one development on the go; the Stewarts were investing in one development they understood and the accountant understood and the solicitor understood and they knew what they were getting into. The witness was taken through the correspondence about the pressure to get the Gilnahirk development through during the July holidays. In particular he was shown the bank documentation whereby funding did not come through for the full amount and it was put to him that there was a last minute decision in July to apply the money to Gilnahirk to avoid the deal folding. The witness did not accept that proposition.

[42] It was put to the witness that 24 hours before completion he was asking for a facility from the bank and again the witness said that this was not material. The witness did accept that the £490,000 went towards the development at 62 Gilnahirk Road. The witness was asked to explain the revision to terms set out by Lowry Grant following the meeting in October 2008. He said that the letter of 13 October 2008 was by agreement. He also said that the change to the Articles of Association and Memorandum of Agreement were to reflect the reality on the ground. He said in evidence that there was no issue with this on the part of the Stewarts. The witness was very keen to point out that Ballygowan 2 was never a development it was just a conversation. He said that the investment, if at all, was going to be in Ballygowan 1 but as that was not taking place immediately the investments went to Gilnahirk.

[43] Throughout his evidence this witness suggested that Lowry Grant had made mistakes in the documentation and that really led to the problems in this case. This witness also confirmed that he was speaking on behalf of his uncle as well. As a result Mr Martin senior did not give evidence and there was no issue taken with that by counsel.

[44] Mr Kirkpatrick, solicitor then gave evidence. He confirmed that at the time of the relevant events he was a partner in Murlands solicitors and that he had retired in October 2012. He said that Mr Martin was a client from approximately 2006. He said that he was aware of a development known as Cedarview which was the first development mentioned to him. He said that the relationship was professional only and he was also aware that Lowry Grant was the accountant but he had no other relationship with him. This witness confirmed that he knew that he was being accused of being involved in a conspiracy with Lowry Grant to defraud the plaintiffs but he emphatically denied that. The witness said that he had never met Mr Grant.

[45] This witness then described the meeting on 14 June 2007. He said that he had asked Mr Martin not to bring the other investors. He said that the meeting was to deal with developments but he said that was in relation to Gilnahirk and he was effectively meeting Mr Martin to sign the contracts regarding 49, 51, 53 and 62 Gilnahirk. He said he was very unhappy about the Stewarts attending and he had said to Mr Martin that he was not content to speak to the Stewarts given that they should obtain their own legal advice. He said that he allowed the Stewarts into his office as a matter of courtesy but no advice was given to them. During his evidence this witness disputed any suggestion that he said anything regarding needing the investment monies for Ballygowan because the deal may be lost due to other bidders.

[46] The witness accepted that monies were paid on behalf of the Stewarts by McCoubrey Hinds, solicitors. He confirmed that he was directed by Mr Martin to apply those monies to Gilnahirk. He said those were his instructions and from his solicitor's perspective he has to act on his instructions. The witness said that looking back with the benefit of hindsight he can see that some questions may be asked about that however that was his clear duty. The witness said that he made very clear that he was not going to be acting for the Stewarts. In relation to the amended Articles of Association and Memorandum he said that he was required in July 2009 by John McKee acting for the Ulster Bank regarding security for BMD and GEM to take that course. He said that he had downloaded the original forms from the company's register and there had been a mistake in terms of the amendment. He denied there was anything dishonest in relation to this.

[47] Under cross-examination it was put to this witness that the money had been applied by the Stewarts to a company development and it was subject to a trust because it was for a particular development. The correspondence of 12 June 2007 was put to the witness in detail. However, the witness said that he did not have that letter as he remembers it at the meeting on 14 June 2007. He says he was simply instructed to allocate shares and he did undertake that task after the meeting.

[48] The witness said that he did not have experience in dealing with share transactions of this nature. He said that looking back he wished he had done things differently but at the time he was simply acting on the client's instructions. The witness was taken in detail through the circumstances around early July when the money sent by the Stewarts in the sum of £490,000 was applied to Gilnahirk. He accepted that alarm bells should have rung at this stage given the issues with the bank, but he said he had faith in his client and acted on the instructions of the client. He made the point that he was involved in the issuing of shares. The witness accepted that to the police he said he had not seen the letter of 12 June 2007 however he accepted that he made a mistake in relation to that. It was put to the witness that he had dishonestly assisted Mr Martin in defrauding the plaintiffs. He denied this and said that he was acting on instructions.

## Core Documentary Evidence

[49] A large volume of material has been put before the court however I intend to refer to some of the documents which are of particular relevance to this case as follows:

- (i) By letter of 14 December 2006 the Eric Cairns Partnership Residential Estate Agents wrote to Mr Nigel Kirkpatrick at Murland & Co, Solicitors, regarding lands at Comber Road, Ballygowan. This letter states as follows:

“We write to advise that we have, subject to congregational approval, agreed the above lands for sale to your client (Stewart & Martin Developments, Mr Adrian Martin) on the undernoted terms. We understand from the church that the process of seeking congregational approval is underway and that once obtained the Presbytery and probably the Charities Commission may also have to approve the sale. The process may take some weeks and I would be keen that legal matters are progressed. “

In this letter the offer is stated as £1.9m. The completion date is to be agreed. There is a handwritten note on the page which refers “to the matter being put on the long finger - by time goes through church meetings well into New Year.”

- (ii) The next document is dated 12 June 2007. This is a note of an agreement reached between Mr Johnny Stewart and BMD Developments. It is signed by Mr J L Grant, Principal of JL Grant & Company, Accountants, and it was sent to McCoubrey & Hinds Solicitors, Roger Moore Associates, J J McAuley Solicitors, and Nigel Kirkpatrick Solicitors. I set out the full content of this letter as follows:

“We act as accountants for BMD Development Limited and today met with Mr Robert Martin, Mr Adrian Martin and Mr Johnny Stewart. The purpose was to discuss their investment in BMD Developments and in particular the development of sites at Ballygowan 1 and Ballygowan 2.

The following structure of funding in return was agreed:

- (i) initial injections of £1.8m to be invested as redeemable preference shares (new class of shares to be created with rights as below).

- (ii) The redeemable preference shares are owned as follows:
  - (a) Mr Robert Martin – one third.
  - (b) Mr Adrian Martin – one third.
  - (c) Mr Johnny Stewart – one sixth.
  - (d) Mr John Stewart – one sixth.
- (iii) The redemption rights to be as follows:
  - (a) Cost of shares plus proportional share of the profit less dividends already distributed on the completion of Ballygowan 1 and 2, after payment of all interest, billed costs and overheads of these projects.
  - (b) The date for redemption will be the later of 2 months after completion and disposal of the finished development or December 2009.
  - (v) The redeemable preference shareholders will have equal rights in determining decisions regarding the Ballygowan 1 and 2 sites, by simple majority, but will have not expectation of directorships in BMD Developments Limited, these remain as at present (Robert Martin and Adrian Martin).
  - (vi) The Directors of BMD Developments Limited have requested that we audit the financial statement of the company and issue an audited set of financial statements, we are happy to do this and should have accounts completed YE 31 December 2006, by 22 June 2007.
  - (vii) We have undertaken to assist BMD Developments in maintaining a clear and accurate record of all transactions related to these two sites, together with the development of control in reporting mechanisms for the four shareholders.”
- (iii) A minute of a meeting of the directors of BMD Developments Limited has been provided. This is a meeting which was held on 22 June 2007. It is



described as an extraordinary general meeting at 57 Moss Road, Hillsborough, Carryduff, Belfast. Those present were Mr Robert Martin, Mr Adrian Martin. The note states that the following special resolution was passed:

“That the authorised share capital of £100,000 is increased by £1.8m to £1.9m divided into 100,000 shares of £1 each and 1,800 redeemable preference shares at £1 each.

Clause 4 of the Articles of Association be renamed 4A and the following be inserted and hereby known as 4B in respect of the redeemable preference shares.

4B

The redemption rights to be as follows:

- (i) Cost of shares and proportional share of the profits less dividends already distributed on the completion of Ballygowan 1 and 2, after payment of all interests, bill costs and overheads of these projects.
- (ii) The date for redemption will be the later of two months after completion and disposal of the finished development or December 2009.
- (iii) The redeemable preference shareholders will have equal rights in determining decisions regarding the Ballygowan 1 and 2 sites, by simple majority, but will have no expectation of directorships in BMD Developments Limited, these remain as at present (Robert Martin and Adrian Martin).
- (iv) The preference shares to Messrs Stewart to be specifically in relation to the acquisition and development of two building sites as described as Ballygowan 1 and 2.
- (v) The non-director shareholders of the preference shares have no control or entitlement in any other assets of the company whether present or future.

And that the attached memorandum and articles are hereby adopted.

All were in favour.

There being no further business the meeting was closed.”

- (iv) The next letter is that dated 3 July 2007 this is a letter from McCoubrey Hinds Solicitors to Mr W J Stewart. It is regarding the purchase of shares in BMD Developments Limited and it reads as follows:

“We refer to the above matter and to your attendance at our office. We confirm that we are not as yet in receipt of draft share purchase agreement from Murland & Company Solicitors. We also understand that you have not yet received the audited accounts for the year ended 31 December 2006 from J R Grant & Company. We are therefore unable to proceed with your proposed purchase of the shares with the benefit of the usual due diligence and shareholder agreement. However, we understand that you still wish to proceed with the purchase of the shares at the end of this week. We confirm that we are willing to facilitate your purchase by forwarding funds to Murland & Company only. The purpose of this letter is to make it clear to you that we are acting purely on your instructions to forward funds to Murland & Company and not as your legal representatives in respect of the proposed purchase of the shares. We cannot be responsible for any prejudice arising due to the absence of standard documentation and appropriate investigations. We should be obliged if you would confirm that you have had the opportunity to peruse this letter, that you fully understand the implications and that you still wish to proceed. Please confirm the above by signing one copy of this letter and dated same.”

This letter is signed and dated by Mr Stewart senior on 4 July 2007.

- (v) The next letter is dated 6 July 2007. This is a letter from McCoubrey Hinds for the attention of Nigel Kirkpatrick and Murland Solicitors. It states as follows:

“We confirm that we have today authorised a CHAPS transfer in the sum of £490,000 to your client’s account in connection with our above-named client. The monies are transferred subject to the Heads of Agreement set out in the letter to our office dated 12 June 2007 from J L Grant & Company. We should be obliged to receive the

redeemable preference shares in our client's name at your earliest convenience."

- (vi) A letter dated 5 July 2007 regarding 62 Gilnahirk Road, Belfast. This is from Murland Solicitors and it refers to this purchase stating:

"We refer to the above and now enclose cheque in the sum of £410,000 purchase money due herein which is sent to you upon your undertakings as follows:

- (i) Not to encash the enclosed cheque until you receive confirmation from our office that it is in order to do so."

- (vii) The next letter is dated 12 December 2008. It is a letter from J L Grant & Company to James B Kennedy & Company and it states as follows:

"On Wednesday 10 December 2008 I met with Adrian and Robert Martin and they have asked me to reply to your letter dated 3 December 2008 on their behalf and make myself available to meet with you and Mr Stewart about any of the issues raised. Please contact my PA Caroline to arrange a suitable time.

Regarding the points raised in your letter:

- (i) Mr Adrian and Robert Martin have told me that all of the issues were discussed with you and Mr Stewart at a meeting.
- (ii) Regarding the accounts for the year ended 31 December 2007 at that time Mr Stewart was not to my knowledge a shareholder of BMD Developments Limited. I met with Mr Stewart and Adrian and Robert Martin in June 2007 and in conjunction with this meeting I wrote up a letter which represented their intention for business together. This was agreed and sent to Nigel Kirkpatrick of James Murland Solicitors. I have attached a copy of this for your information. I heard nothing more regarding this matter and was unaware of any changes to the shareholdings. The Director/shareholders had in 2006 elected not to hold AGMs.

- (iii) Regarding the authorised share capital, I believe this is covered by point 2 note/J L Grant & Company do not act as company secretary for BMD Developments Limited and at the year ending 31 December 2007, we had no record of any changes to the share capital, we still have no confirmation.
- (iv) Regarding the allotment of shares, we were not informed by BMD Developments Limited or the solicitors that this had happened. This is compounded further by the fact that the money paid by Mr Stewart went directly to the solicitor (a fact I only became aware of on Wednesday). The reference to the letter agreed with Mr Stewart, Adrian and Robert Martin on 15 October 2008 was drafted at a meeting with 3 gentlemen and two subsequent emails of Mr Stewart and in many respects changes the agreement of 12 June 2007 or at least suggests that the June letter did not reflect their intention.
- (v) Consideration for share issues is not reflected in the year end accounts of 31 December 2007 since I had no confirmation and therefore cannot complete. I will of course seek to get to the bottom of this in the 2008 accounts.
- (vi) Regarding your point E, I enclose copies of both the June 2007 and October 2008 Agreement which indicates that the 3 gentlemen were not entirely sure what their intentions were."
- (viii) The next document is a Bill of Sale from Murland Solicitors dated 25 October 2007, this is re 62 Gilnahirk Road, Belfast. The reconciliation account states as follows:

"McCoubrey Hinds advance £489,995 to completion monies £410,000 to A Martin/balance purchase monies re Kingsway £40,485 to fees - Holmes & Moffitt re Kingsway £8,774.48 to costs and outlays as per our invoice £16,696.75 to balance due to you £14,038.77."
- (ix) An attendance note has been provided of a meeting of 6 June 2007 which reads as follows:

“Kingsway

Grahams are under pressure for contract.

Think just needs signed offer.

Completion date not so essential.

Agreed completion date for 30 June – especially if get deposit for you Knockbreda.

Bank will fund these independently from you Knockbreda.

Have an investor John Stewart – is to put £650,000 in to BMD and become equally entitled to profit in Ballygowan site – need to speak to Lowry Grant – not so easy. Reassure holders agreement on how section of company’s assets to exclude all else.

Can get me agreed plan and specification for new build at 62 Gilnahirk – expect application to go in this month – there is already an approval for extensive with same floor space.

Think it is for 3 bungalow with garage.

Expect to complete build – end October.

Is paying development value for Kingsway.

Expect to submit planning for redevelopment again by end month. Not expecting to start anything until January 08.

Willing to pay £10,000 including costs explained LT procedure.”

- (x) The next document is from John McKee & Son to Murland Solicitors. This relates to properties 49, 51 and 53 Kingsway Park, Belfast and 62 Gilnahirk, Belfast. The client is the Ulster Bank Limited represented by McKee Solicitors and BMD Developments Limited represented by Murlands. It reads as follows:

“We refer to previous correspondence in the above and are pleased to confirm that subject to receipt of your

written confirmation of the undertaking set out below, we are in a position to advise our client bank to transfer the sum of £1,260,000 to your client account number. Your undertaking that:

- (v) You will lodge the deed of transfer in favour of your client in respect of 62 Gilnahirk Road, Belfast, together with mortgage/charge and duplication in favour of our client which we return to you at the Land Registry for registration.”
- (xi) The next letter is dated 5 July 2007. This is a letter from Nigel Kirkpatrick to Des Palmer at the Company Shop. It is re BMD Developments Limited, it refers as follows:

“I refer to the above and enclose herewith cheque in the sum of £99.88 in settlement of your invoice in this matter together with your statement for receipting and return in the usual manner.

I mentioned when we last discussed this on 29<sup>th</sup> alt that the allotment of the preference shares to Messrs Stewart was to be specifically in relation to the acquisition and development of two building sites described in Ballygowan 1 and Ballgowan 2. I would want to ensure that the amended articles reflect the specific intention and that the non-director shareholders of the preference shares are to have no control or entitlement in any other assets of the company whether present or future. The two Ballygowan sites have yet to be purchased and are indeed only at preliminary stages of negotiation. Perhaps in light of this you would redraft the resolution and amendments to the memorandum and articles of association. I return herewith completed company forms G133 and G98 (2).”

- (xii) The next letter is dated 15 October 2008 .This is a letter from Lowry Grant which I am going to set out in its entirety. It is sent to BMD Developments Limited and it reads:

“Dear Sir

This letter supersedes the previous letter of 12 June 2007, which while being agreed in J L Grant & Company’s offices, with Johnny Stewart, Robert Martin and Adrian

Martin present, nonetheless contains significant errors and does not reflect their intentions.

Note, since this was a meeting of the Board of BMD Developments Limited, Mr Johnny Stewart was in attendance only.

They are in agreement with the proposals below and would like to amend their agreement to reflect these changes, together with any required changes to Form 133 and 98(2) already completed and submitted to the Registry of Companies (copies of the originals will be attached).

We met today with Mr Robert Martin, Mr Adrian Martin and Mr Johnny Stewart. The purpose was to discuss their investment in BMD Developments and in particular the development of 3 sites:

- (i) Gilnahirk.
- (ii) Ballygowan 1.
- (iii) Ballygowan 2.

At this stage the developments have progressed as follows:

- (i) Gilnahirk - purchased in June/July 2007 for £1.625.000, financed by investment by Messrs Stewart £600,000 (comprising 490 paid in via solicitor) and £110,000 owed by BMD to Messrs Stewart for commissions).

Bank borrowings by BMD Developments £1,025,000 (part secured by two unencumbered properties owned by: Mr Robert and Mr Adrian Martin).

- (ii) Ballygowan 1 - An option to purchase this has been agreed, this is at contract stage although no contract has yet been signed, this is in draft form at £1.7m with £600,000 as the deposit, when agreed.
- (iii) Ballygowan 2 - An option exists, but only verbally to purchase this site from the local church,

however nothing is in writing and no date has been settled to complete this transaction.

The following structure of funding and return was proposed by Mr Adrian Martin and Mr Robert Martin:

- (i) Initial injections of £600,000 as above, from Messrs Stewart and a further £600,000 from Robert Martin and Adrian Martin to be invested as redeemable preference shares (new classes of shares to be created with rights as below). The £600,000 from Robert Martin and Adrian Martin are to be financed from the sale of their Castlereagh site.
- (ii) The initial investments of Messrs Stewart and Mr Robert Martin and Mr Adrian Martin will be secured as second charge is behind the bank, which will have the first charge. Note the second charges will rank equally, in proportion to the amounts invested at any time.
- (iii) The redeemable preference shares to be issued immediately as follows:
  - (a) Mr Robert Martin a quarter.
  - (b) Mr Adrian Martin a quarter.
  - (c) Mr Johnny Stewart a quarter.
  - (d) Mr John Stewart a quarter.
- (iv) The redemption rights to be as follows:
  - (a) Cost of shares plus proportional share of the profits less dividends already distributed on the completion of Gilnahirk, Ballygowan 1 and 2, after payment of all interests, bill costs and overheads of these projects.
  - (b) The date for redemption will be the later of 2 months after completion and disposal of the finished development or December 2009.
  - (v) The redeemable preference shareholders will have equal rights in determining decisions regarding



the Gilnahirk, Ballygowan 1 and 2 sites, by simple majority, a directorship in BMD Developments Limited is available to Mr Johnny Stewart.

- (vi) The Directors of BMD Developments Limited have requested that we audit the financial statements of the company and issue an audited set of financial statements, we are happy to do this and should have accounts completed YE 31 December each year available by 30 June following.
- (vii) We have undertaken to assist BMD Developments in maintaining a clear and accurate record of all transactions related to these two sites. Together with a development of control and recording mechanisms for the 4 preference shareholders.

The following company registry form will need to be amended:

- (i) Form 133, notice of increase in nominal capital.

The number of authorised redeemable preference shares at £1,800,000 can remain although the intention is issue only £1,200.

Redemption rights (i) and (iv) should refer to Gilnahirk and Ballygowan 1 and Ballygowan 2 redemption rights, (iii) should refer to the option of a directorship from Johnny Stewart.

The names of the allottees (of Note 4, however the preference shares should read £300,000 each for the 4 shareholders.

- (ii) Form 98(2) return of allotment of shares. The number of shares allotted at Section 2, should be amended to £1.2m at £1 each not £1.8m as stated on original form.

Should you have any queries on any of the above, please do not hesitate to contact me at the above address or contact number regards Lowry Grant."

## Consideration

[50] This case arises in a commercial context. The genesis of the claim is a contract for the purchase of redeemable preference shares. That might lead a court to think there is a simple answer to the questions at issue based on breach of contract. Indeed, rescission is the primary remedy sought. However, the contract was between the plaintiffs and the company which in law has a distinct legal personality. The plaintiffs have not sued the company for understandable reasons. Rather they have sued the Martins as directors in their individual capacities and the solicitor who acted for BMD in this transaction. I am not satisfied that rescission is an appropriate remedy given the contractual relationships in this case and passage of time. In my view this case is really about whether the plaintiffs should be compensated for their loss. I consider that the height of the claim is for £490,000. I am not satisfied that the plaintiffs should be able to recover for the additional £110,000 they claim. That is because of the nature of that arrangement and the lack of any formalities or consideration regarding the Cedarview project.

[51] The factual matrix has resulted in very many heads of claim being pleaded in a rather disorganised way. I am also bound to say that some of the claims have not been properly particularised. That is probably because the plaintiffs concentrated on a claim that the money paid by the plaintiffs was impressed with a trust which was breached by the first and second named defendants and that the third named defendants dishonestly assisted with this. At the outset the claim of dishonesty was also made against the company accountant however that case was abandoned when he was released from proceedings. That course undoubtedly changed the complexion of the case as with it came an implicit acceptance that there was no grand plan concocted between the first and second defendant and their advisors.

[52] I reach my conclusions having heard all of the evidence and taking into account the submissions made by counsel for the plaintiffs and counsel for the third named defendants. I have considered written submissions from the plaintiffs and the third defendant on all issues. The first and second defendants offered no alternative legal submissions on the many legal claims put forward as they submitted that this case came down to the credibility of the witnesses. I start by setting out my conclusions from the oral and documentary evidence.

[53] I bear in mind that the evidence was given ten years after the key events. The evidence also relates to commercial transactions which the parties naturally want to cast in the most advantageous light for themselves with the benefit of hindsight. Hence, I approach the oral evidence with a degree of caution. However, I also have the benefit of contemporaneous documentary evidence and that has provided a foundation for the conclusions I have reached.

[54] Having heard the evidence it is clear that the relationship between the two main players, Mr Stewart Snr and Mr Adrian Martin began very informally and remained that way with little emphasis on paperwork or formalities. When

Mr Stewart first became involved with Mr Martin it was 2005 and the property market was buoyant. Mr Stewart like many others wanted to share in the windfalls from development. He enjoyed a cordial relationship with Mr Martin with whom he seemed to share a similar outlook on life. Everything seemed to tick along until the 2007 investment. This was just before the crash in the property market and the insolvency of the company.

[55] I heard a considerable amount of evidence about Mr Stewart Snr's business life. He clearly achieved considerable success in the marketing of sewing machines. This involved him interacting with associates on a national and international stage. Mr Stewart was animated when explaining his own career trajectory. However, when it came to the transactions at the heart of this case his evidence was less assured. In particular he found it difficult to recollect the specifics of what exactly was said by Mr Martin as regards the transaction at issue. I have considered why this might be. Having done so I do not think that Mr Stewart was trying to mislead the court in any way and his evidence simply reflects his own recall ability which is explained in the medical evidence, the passage of time and the nature of the arrangement that was in place between the two men. I do not propose to penalise Mr Stewart on the basis of these issues.

[56] I bear in mind that this relationship developed in a very relaxed environment in a coffee shop on the Cregagh Road. There was no paperwork involved with any of the proposed developments. The Cedarview development was a very loose arrangement as nothing was speculated by Mr Stewart Snr, he did not act to any detriment, and the £110,000 was a windfall. I accept that Mr Stewart Snr was interested in to the Ballygowan project as this is set out very clearly in the memorandum of agreement of 12 June 2007. In my view this document establishes that a broad agreement was reached between the various parties at that time. However, it is important to note that this is only a heads of agreement, it is not a contract. It is also a document which on any view poses many questions, a subject I will return to later.

[57] Mr Stewart Snr thought that his investment in the company was always for the purpose of reaping a share out of the Ballygowan development and I believe him on that because there is documentary evidence to back up what he has said. However, his evidence was unclear as to the fundamentals of this deal namely what Ballygowan comprised, what 1 and 2 meant, when they would be completed, what the financing agreement was and what the security was in place. I believe Mr Stewart when he said that whilst he was taken to the Gilnahirk site he was not interested in investing in that project. I also accept that Mr Stewart was led to believe that the Martins had £1.2 million to invest as joint participants in the venture.

[58] I must say that while Mr Stewart presented as a straightforward man he came across as incredibly naïve to simply accept Mr Martin's word about an undefined development with no proper paperwork, no security, and no real idea of the potential pitfalls. This was a complicated commercial transaction however I am not

convinced that Mr Stewart fully understood it or if he did, he was willing to take an obvious commercial risk. I found it surprising that Mr Stewart would not inquire into the financing of arrangements particularly as he was a businessman himself. In particular he did not question why BMD was used as the company vehicle rather than S&M developments. Also he did not ask for valuation evidence or actual purchase details.

[59] Mr Stewart senior has the considerable benefit of the documentary evidence to support his case. Having looked at this alongside the oral evidence I accept that a representation was made to Mr Stewart that he was investing in Ballygowan 1 and that he relied upon that. I also accept that he was told by Mr Martin that there was some pressure otherwise he would not have sent over the money at the relevant time. I believe Mr Stewart's evidence that he did not immediately discover that his money had been applied to Gilnahirk. He also has the benefit of paperwork to back up his claims that Mr Martin agreed to pay him back when all was revealed. Finally, having considered the oral and documentary evidence I am satisfied that he did not agree the change to the heads of agreement which were put forward in October 2008.

[60] A core issue in this case is what the "heads of agreement" document actually means. On any examination this is a document which is unclear and ambiguous. For instance it refers to the Stewarts investment in the company and in particular the development of sites at Ballygowan 1 and 2. There is no definition of what is meant by Ballygowan 1 and Ballygowan 2. Crucially the document does not say that the money is specifically earmarked for these particular developments. It also does not say that the money would be for the exclusive use of Ballygowan. Also and fundamentally, this was a share purchase agreement. If money is paid to a company for a projected share issue it becomes the property of the company. I have also been referred to authority which states that money advanced to buy shares is not normally held on trust.

[61] This was to be an *initial* injection and presumably that means more money would be required. That accords with mention in evidence of £4.8million as the projected price of the entire project. There is reference to the profit distribution on completion of Ballygowan 1 and 2 after payment of interest, build costs and overhead of these projects." Does that mean that both developments needed to be completed? There is no provision for what would happen if the long stop date were missed and whether the company could continue to trade. These questions highlight the uncertainty and imprecision of what was agreed.

[62] In truth, all of these difficulties should have been explored and pinned down in a shareholders agreement. That would happen in the normal way because such a heads of agreement is undoubtedly the first step in a commercial transaction of this nature. It is usually followed by detailed discussions involving professional advisors which culminate in the completion of a formal contract. I venture that it would be extremely rare for parties to proceed in a commercial venture of this nature without due diligence and the formalisation of contract terms and warranties.

This process was identified by McCoubrey Hinds solicitors. However, against their advice the Stewarts decided to proceed. I am also struck by the actions of the Stewarts after the money was paid. Whilst they seemed anxious about receiving the share certificates they also appeared relatively content that there was a pause in the development plans until well into 2008.

[63] I then come to the meeting of 14 June 2007. It is unfortunate that there is no minute of this. I therefore have to assess what the various adults have said and their evidence is in conflict in relation to this. Having considered this I have decided that the following represents the most credible version of what happened at that meeting. Firstly, I accept the evidence of Mr Kirkpatrick that the Stewarts were not actually invited to this meeting. Secondly, I accept his evidence that he was uncomfortable about the meeting. Thirdly, I note that this was only two days after the heads of agreement were created. Overall I am of the view that Mr Kirkpatrick had this meeting foisted upon him, that he was placed in an unenviable position by Mr Martin and that he was angry about that. Mr Kirkpatrick should really not have let this situation arise.

[64] It is hard to form a clear view of what was discussed at this meeting. However, utilising the documentary evidence I am prepared to accept that when the Stewarts came into the meeting the letter of 12 June 2007 was referred to. It may not have been read out but the broad terms were discussed. That is the most reasonable conclusion to reach given that the solicitors writing is on the letter. It follows from this that the meeting must have highlighted the development of Ballygowan rather than Kingsway/Gilnahirk. I accept the plaintiff's evidence in relation to that.

[65] However, I am not convinced by the plaintiffs' case that Mr Kirkpatrick made any express representations about the deal upon which the plaintiffs relied. In particular I am not satisfied that an express representation was made by Mr Kirkpatrick that the transaction was going to fall through if the money was not paid. If this was said it was more likely made by Mr Martin to effect the heads of agreement with the Stewarts on 12 June 2007. I can well see that something along these lines as why else would the Stewarts re mortgage their homes and pay the money at that particular time.

[66] In my assessment of the evidence Mr Kirkpatrick clearly advised the plaintiffs to obtain their own independent legal advice. I am satisfied that there is no evidence of any intention to form a contractual relationship between the solicitor and the Stewarts. I am not satisfied that there was any express or implied retainer. This is borne out by the subsequent correspondence from McCoubrey Hinds solicitors. For instance there is an engagement between solicitors about the relevant share forms. It is also common case that Mr Kirkpatrick contacted Billy McCoubrey about the transaction.

[67] However, that is not the end of the matter so far as Mr Kirkpatrick's involvement is concerned. He had been sent the 12 June 2007 heads of agreement

document. He clearly had knowledge of the two key projects at issue. He did not give any indication to the Stewarts that the deal was anything other than they thought. I believe the plaintiffs when they said that they thought Mr Kirkpatrick would give effect to the deal for all of them and that they subsequently relied upon him to do that.

[68] I was struck by the fact that when giving his evidence Mr Martin could not recall much detail and he displayed an alarming lack of knowledge of any paperwork even though he was an experienced property developer. His standard response to questioning was along the lines that he “left it to the suits”. Mr Martin was often evasive when pressed. Having listened to him carefully I have concluded that his evidence was not credible in a number of key respects. I have formed the view that the agreement he had with the Stewarts was that they would share in profits from the development of Ballygowan. I believe Mr Martin when he said that Ballygowan 2 was the more distant prospect than Ballygowan 1. However, I do not believe him when he said that the agreement he made with the Stewarts was in relation to Gilnahirk. In my view he was clearly representing to the Stewarts that they would all be investing in the Ballygowan project and that they needed to get their money in right away. I consider that he knew that this was wrong and that the Stewarts would rely on him. He also made a representation that he and his uncle were joint investors and that they would provide £1.2 million. This was false and yet it was the core part of the agreement. In his evidence Mr Martin gave no satisfactory explanation as to why he and his uncle did not pay their part of the investment monies when the Stewarts did.

[69] In my view the letter of 3 July 2007 is highly significant as it demonstrates that McCoubrey Hinds were the solicitors for the Stewarts, they were advising their clients regarding a share purchase, and they provided warnings to the clients proceeding without due diligence and in the absence of a shareholders agreement. There is no mention in this correspondence that Mr Kirkpatrick had taken over as solicitor for the Stewarts. Also, following from this correspondence the Stewarts clearly acted against advice in forwarding the money.

[70] The second letter of 6 July 2007 transferring the money is clear in that the £490,000 was sent to Mr Kirkpatrick on condition. However, it goes no further than saying that the money is sent subject to the heads of agreement. The problem with this is that I consider the terms of the 12 June 2017 letter to be unclear and ambiguous. There is no specific undertaking sought or mention of a trust.

[71] From the evidence it is clear that by the start of July 2007 the bank would not lend the full extent of the money for completion of the Kingsway development which also involved purchase of Gilnahirk. I also note that the purchaser of Gilnahirk changed from Mr Martin personally to BMD although this was not particularly drawn out in evidence. I accept the argument that Mr Adrian Martin gave the instructions that the Stewarts money be applied to Gilnahirk in early July. It seems to me that the most reasonable explanation for subsequent events was that

there was a problem with liquidity at that time and that Mr Martin then gave instructions to apply the Stewarts money to Gilnahirk.

[72] I will not dwell upon what happened subsequently save to comment upon a number of worrying features. I harbour a concern as to why part of the balance of the £490,000 was paid over to Mr Martin and another company (GEM). I also accept the evidence of Mr Stewart Snr in relation to the October 2008 meeting after which a minute was sent to him which purported to change the terms of the June 2007 agreement to include Gilnahirk as his investment rather than Ballygowan. Mr Stewart Snr was quite clear that he did not agree to this and I accept that. It is also clear that the Ballygowan project remained on the agenda throughout 2007 and 2008 as correspondence was exchanged between Mr Kirkpatrick and Hewitt and Gilpin Solicitors about its progress. So this is not a case where this was a phantom development. However, that project seems to have been beset by planning difficulties and as result it never got off the ground given the property crash in 2008.

### *Liability of the Martins*

[73] The contract between the plaintiffs was with the company. However, is it possible for directors to have joint tortious liability alongside the company in certain circumstances? At paragraph 7-015, *Chitty on Contracts* refers to the fact that a third party representor may be liable in damages if he has induced another to enter into a contract with a third party, either in tort, if the misrepresentation was fraudulent, or in some cases negligent or on the grounds of a collateral contract. The collateral contract argument was not made and so the common law remedy is in tort. I consider that claim is established for the following reasons.

[74] In *Williams v Natural Life Health Foods Ltd* [1998] 2 All ER 577 the House of Lords decided that a company director could be liable for negligent misstatement if he had assumed personal responsibility. It is rare that these duties arise. However, they may pertain in small family companies where a “special relationship” is formed and the director is effectively the guiding mind. These ingredients are all present on the instant facts. Mr Martin had the relevant information and he effectively had control of the company. It is therefore not a stretch to impose tortious liability on the particular facts of this case.

[75] Deceit requires a number of elements to be proven namely that there has been a representation. Secondly, it must be false. The defendant has to know that the statement was untrue or be reckless as to truthfulness. Anything less is not sufficient and this is a subjective test as it relates to the defendants actual knowledge and state of mind. Thirdly, there must be reliance by the claimant. And fourthly, damage or loss must have been suffered as a result of the deceit, see *Derry v Peek* [1889] 14 App Cas 337. The standard of proof remains the balance of probabilities however convincing evidence is required given the nature of the allegation see *Hornal v Neuberger Products Ltd* [1957] 1QB 247. It is clear that in these circumstances a director who has made fraudulent misrepresentations will not be able to raise

limited liability and separate personality of the company as a defence. I also bear in mind the words of Irwin J in *Contex Drouzhba v Wiseman & Anor* [2006] EWHC 2708 that “ it is perfectly possible for a businessman to practice deceit in order to keep his business alive, in the unreasonable hope that things will come good in the end.” However, there is a consequence when the money of others is involved as in this case.

[76] I have considered this matter carefully bearing in mind the cogent evidence required to found such a claim. Having considered the evidence of Mr Stewart and Mr Martin I am firmly of the view that Mr Stewart’s evidence is to be preferred as to what was said by Mr Martin which induced him into the deal. I am satisfied on the basis of all of the evidence that Mr Martin made two key representations during pre-contractual discussions which were that the money was needed immediately otherwise Ballygowan may be lost and also that he and his uncle would raise their share of the £1.8million investment. My view is strengthened by the fact that these representations were effectively incorporated into written terms between the parties. In my view Mr Adrian Martin was reckless as to the truth of these matters. The Stewarts clearly relied upon these representations as they entered into the contract on the basis of them. In my view it is clear that the Stewarts would not have entered into this arrangement but for the false representations made by Mr Adrian Martin. The plaintiffs have also suffered loss as a result of this namely the £490,000 they invested.

[77] This finding is sufficient to deal with the plaintiff’s case against the first and second defendants however for the avoidance of doubt my view is that they would also have been liable in negligence and or breach of fiduciary duty if deceit had not been proven. Accordingly, the plaintiffs can recover against the first and second defendant on the basis of fraudulent misrepresentation. I say this on the basis of the special relationship between the parties given that Mr Adrian Martin was effectively the company and as he said in evidence he “treated the company money as his own.” The plaintiffs are entitled to recover the £490,000 they speculated on the basis of the representations made. The first and second defendants are jointly and severally liable for that. There is no common law defence of contributory negligence in relation to fraudulent misrepresentation and so even though the plaintiffs may have discovered the issues had they made the necessary enquiries this issue does not arise so far as the first and second named defendants are concerned.

[78] The plaintiffs’ other arguments based upon equity are not strictly necessary given that they can avail of a common law remedy. However, lest I am wrong in the conclusion I have reached in common law I will explain my views of the equitable claim which was based upon *Barclays Bank Ltd v Quistclose Investments* [1970] AC 567. In *Juliet Bellis and Company v Chaliner and Others* [2005] EWCA Civ. 59 the relevant principles are summarised from paragraphs 54-65. In that case Briggs LJ was referred by counsel to a number of other first-instance authorities in which *Quistclose*-type trusts had been recognised in circumstances said to be analogous to the present case. They were *Re Nanwa Goldmines Limited* [1955] 1WLR



1080; *Kingate Global Fund v Knightsbridge* (19.11.09, Bermuda Court of Appeal); *Bieber v Teathers Limited* [2012] 2 BCLC 585, [2013] 1 BCLC 248 (CA) and *Brown v Innovator One PLC* [2012] EWHC 1321 (Comm). In that regard, he stated as follows:

“For my part, I found that they added little to an understanding of the basic principles which I have summarised. Each of them concerned the true construction of the detailed terms of the invitation to invest and, in every case (although the language of the earliest of them is of course different), the Court's concern was to ascertain whether the money transferred was at the free disposal of the transferee.”

[79] The above points to the fact specific nature of this exercise. I have also been greatly assisted by the submissions of counsel on this issue. At paragraph 8 of his written closing Mr Ringland refers to an article following from *Bellis v Challinor* which highlights four practical points as follows:

“The test for a *Quistclose* trust requires evidence of a positive intention, by words or conduct of the putative settlor, to create a trust.

The test is objective—a person who does subjectively intend to create a trust may fail to do so if his words and conduct, viewed objectively, fall short of what is required.

Whilst the factual background will be relevant, that context must be used as a tool for the construction of the words spoken/written, rather than as a means of subverting their true meaning.

Commercial counter parties wishing to secure a loan/investment by way of trust should do so expressly. The courts are unwilling to recast their bargain to take effect in the way in which with hindsight they would have preferred it to operate.”

[80] The above points to the fact specific nature of this exercise. The most convincing argument is that the trust arose when the money was paid over by virtue of Mc Coubrey's letter. Turning to this case and applying an objective analysis I am not satisfied that such a trust is established or that there was any intention to create such a trust between the Stewarts and BMD. There were no clear submissions made as to the purpose of this trust or who the trustee was or why in a share purchase the beneficial interest would remain with the payer.

[81] However, my main issue with this argument is based upon an examination of the invitation to invest because that must form the basis of any *Quistclose* trust. The core document is the heads of agreement of 12 June 2007. I find this falls short in a number of respects. I accept that the agreement refers to Ballygowan 1 and 2 by use of the words "in particular". But, as Lord Millett said, that is not enough to create such a trust. In the present instance, I note that (i) this was a share purchase (ii) the agreement does not use a word of exclusivity such as "only" to describe the purpose (iii) there is no requirement to keep the money separate in a special bank account and (iv) there is an inherent uncertainty in relation to the terms. For these reasons the facts are different from those in *Quistclose* where the relevant term was that "the loan monies will be utilised for the acquisition of property on behalf of our client and for no other purpose." Applying an objective analysis I am not satisfied that the facts support the *Quistclose* trust argument.

### *Liability against Mr Kirkpatrick, the solicitor*

[82] Given what I have said about the *Quistclose* trust claim it is obvious that a claim of dishonest assistance cannot succeed against the solicitor. *Snells Equity* paragraph 40-01 sets out the principles which must be established for dishonest assistance and at 40-01 states:

"The general requirements of liability for dishonest assistance are as follows:

- (1) There is a trust.
- (2) There is a breach of trust by the trustee of that trust.
- (3) The defendant induces or assists that breach of trust.
- (4) The defendant does so dishonestly."

[83] In any event I am not satisfied on the facts that the solicitor has acted in a dishonest manner. This was the main focus of the plaintiffs' case but it must be remembered that such an allegation is serious and requires cogent evidence. I am not satisfied to the requisite standard that it is proven in this case. In my view the solicitor's actions in advising the Stewarts to obtain their own independent legal advice is fundamentally inconsistent with the suggested deception.

[84] The other claims made in the pleadings were secondary arguments and I have considerable sympathy with Mr Ringland's submissions that they are not properly particularised. However, I do not rule out the claims on that basis. I have already set out my view that the first and second named defendants effectively induced the plaintiffs into the contract under false pretences. Did the solicitor also have a role in

that? The plaintiffs argue that he did by virtue of the 14 June 2017 meeting. I have considered this argument and I cannot accept it for a number of reasons. I have already said that I am not satisfied that there was a conspiracy and that case was weakened when the fourth defendant was released. I have also said that the meeting was foisted upon the solicitor.

[85] There was no specific case made against the solicitor for misrepresentation but in any event I am not satisfied that any express or implied representations were made as alleged by the plaintiffs save for one matter I refer to below. Crucially as I have stressed the solicitor advised the plaintiffs to get independent legal advice at the meeting and they did so. Flowing from the above I am not satisfied that the solicitor can be liable for the plaintiffs paying their money over. I keep in mind that the solicitor has no duty to advise as to commercial risks. I am also strengthened in my view by the fact that McCoubrey Hinds solicitors were clearly retained by the plaintiffs. They gave specific advice that they could not recommend the plaintiffs proceeding with this deal without safeguards which the plaintiffs chose to disregard.

[86] However, an uncomfortable feature from the solicitor's point of view is that he had direct dealings with the plaintiffs. Flowing from that questions arise as to whether or not the solicitor assumed a duty of care to them, whether there was a breach of duty and whether loss flowed from that breach. A solicitor owes a duty of care to the party for whom he is acting but generally owes no duty to the opposite party: *Ross v Caunters* [1980] Ch 297, 322. The absence of that duty runs parallel with the absence of any general duty of care on the part of one litigant towards his opponent: *Jain v Trent Strategic Health Authority* [2009] UKHL 4, [2009] AC 853. The real question is what if any relationship was established between the Stewarts and Mr Kirkpatrick. I have carefully considered this on the basis of the evidence.

[87] Having done so I am not satisfied that any express or implied retainer was created between the Stewarts and Mr Kirkpatrick. It is clear to me that there was no intention to create a contractual relationship of any kind. There is no documentary support for a retainer, no payments made to the solicitor and no contact until much later on when the plaintiffs became aggrieved. The ingredients for a solicitor-client relationship are simply not present.

[88] However, a solicitor can be liable to a third party for economic loss suffered as a result of negligent misstatement or negligent advice despite the absence of any contractual relationship between them. In the recent Supreme Court case of *Steel & Others v NRAM* [2018] UKSC 13 Lord Wilson analyses this area of law flowing from *Hedley Byrne & Co v Heller & Partners* [1964] AC 465. It is clear from that decision that the duty will only arise in a special case. Lord Wilson draws from the decision in the *Al-Kandari* case that the solicitors owed a duty of care to the opposite party because they had stepped outside their normal role and to establish this it is important to:

“...demonstrate in particular that the solicitor will not assume responsibility towards the opposite party unless it was reasonable for the latter to have relied on what the solicitor said and unless the solicitor should reasonably have foreseen that he would do so. These are, as I have shown, two ingredients of the general liability in tort for negligent misrepresentation; but they are particularly relevant to a claim against a solicitor by the opposite party because the latter’s reliance in that situation is presumptively inappropriate. Thus, the reasonableness of the claimant’s reliance and of the defendant’s foreseeability of it comprised the special feature which gave rise to the liability in the *Allied Finance* case and in the *Dean* case and to the arguable liability in the *Connell* case; and, although the claim in the *Midland Bank* case failed for other reasons, the fourth of the requirements valuably identified in Lord Jauncey’s judgment was that the solicitor should have been aware that the pursuer was likely to rely on what he had said.”

[89] *Flenchley & Leech, Solicitors Negligence and Liability*, states at paragraph 1.28:

“the clearest indication that solicitor has stepped outside his original retainer and undertaken a responsibility to the claimant is where there are direct discussions or communications between the solicitor and the third party.”

That ingredient is present here by virtue of the 14<sup>th</sup> June meeting. The question is whether Mr Kirkpatrick assumed responsibility to the plaintiffs. A solicitor will clearly only assume liability to a third party in exceptional circumstances. All of the texts I have read refer to the need for caution in this area. That is because the solicitor’s primary duty of loyalty and confidentiality is to his own client. However, that must be viewed in the context of a particular case. I bear in mind the dicta in cases such as *Dean v Allit & Watts* [2001] EWCA Civ 758 and *White v Jones* [1995] UKHL 5 where duties have arisen.

[90] A useful synopsis is found *Hollander & Salzeno* dealing with conflicts of interest at paragraph 9-004 which reads as follows:

“In England the trend of authorities is towards judging the issue of duty of care to another party in a transaction on its own merits and away from a quick application of a general rule that the profession cannot owe a duty to his client’s adversary. It may be that that helpful question to

ask in a given case is whether the claimant was for the particular purpose of the duty alleged truly the adversary of the client, or just another person relying on the professional for the same purpose as the client. In the former case no duty can arise because of conflict of interest inherent in the situation; in the latter it may or may not arise depending on the usual tests.”

[91] In the highly unusual, and indeed exceptional, facts of this case I am satisfied that such a duty is established by virtue of the 14<sup>th</sup> meeting and Mr Kirkpatrick’s actions whereby he advised the plaintiffs that he would effect the share purchase transaction once agreed. This may be categorised as a limited duty of care see *Caliendo v Mischo de Reya* [2016] EWHC 150 which the plaintiffs referenced in the written arguments. So Mr Kirkpatrick assumed some responsibility to the plaintiffs.

[92] In his well-focussed written argument Mr Ringland rightly raises the reasonableness of any reliance. The question is essentially whether it is reasonable for the plaintiffs to rely upon this solicitor having rejected the advice of their own solicitor. There is considerable strength to that argument. However, I think the two solicitors were performing different functions and so liability is not precluded altogether but equally the plaintiffs have clearly contributed to their loss.

[93] As I have found that Mr Kirkpatrick had a duty of care to the plaintiffs I must also consider whether he breached the duty and whether any breach caused loss which is recoverable. Mr Kirkpatrick rightly said that he considered he had a duty of loyalty to his client and he felt that he should simply act on his instructions. However, I believe that he also had an obligation to the plaintiffs who relied upon him. During his evidence Mr Kirkpatrick pertinently said that with hindsight he would have done things differently. That was an honest response. I accept that Mr Kirkpatrick was put in a difficult position. However, in my view a reasonably competent solicitor would have paused and realised that he could not act further without making further enquiries in relation to application of the monies he had received.

[94] I do not consider that a solicitor can simply apply monies from a client account when he knows that the other party to the transaction may be under a misapprehension about it. In particular, Mr Kirkpatrick was aware that the plaintiffs had agreed to be part of a £1.8 million investment with the Martins yet he had received no money from the Martins and he was being asked to pay the Stewarts money immediately to an impending house purchase. To my mind the solicitor should have realised that the Martins may have misled the Stewarts. There has therefore been a breach of duty by him and so the solicitor is liable in negligence. This is sufficient to deal with the case against the solicitor. Whilst some arguments were raised as to breach of implied trust and breach of Solicitors Regulations, they were not developed in any detail and I reach no conclusion upon them. In any

event, I am satisfied that there is no prejudice occasioned to the plaintiffs applying equitable principles, see *AIB v Redler* [2014] UKSC 58.

[95] I consider that the loss is the same as that attributed to the first and second named defendants. It is the £490,000. However, unlike the situation with the first and second named defendants, a reduction for contributory negligence is open to me. Such a finding was pressed upon me in submissions by Mr Ringland where he submitted that the contribution should potentially be 90%. The plaintiffs argued that no reduction should be made. I have considered this issue carefully taking into account all of the circumstances of this case. In particular I bear in mind that this was a risk laden venture which the plaintiffs proceeded with against the advice of their own solicitor. The particulars are set out by the third named defendants in the amended defence which I summarise as:

- proceeding with the advance of £490,000 against the advice of their solicitors, McCoubrey Hinds as contained in correspondence from Mc Coubrey Hinds dated 3 July 2007
- proceeding with the advance of £490,000 without having BMD Ltd's audited accounts for year ended 31 December 2006
- proceeding with the advance of £490,000 without having carried out or caused to be carried out any due diligence investigation in respect of BMD Ltd
- Proceeding with the advance of £490,000 without having in place a shareholders agreement or share purchase agreement in respect of BMD Ltd

[96] Accordingly, I am of the view that there is a high level of contributory negligence and that it would be just and equitable to reduce the damages recoverable from the solicitors by 80%.

[97] For the avoidance of doubt where I have not mentioned some of the other claims put forth it is because I have found that they are not made out or not particularised or not necessary to deal with the facts at issue.

### **Overall Conclusion**

[98] The plaintiffs succeed against the defendants. The damages are £490,000 with a reduction of 80% for contributory negligence against the third defendant only. I will allow the parties to consider whether any other issues arise given the findings and the issue of costs.

## Addendum - Delivered: 30 January 2019

[99] Following delivery of this judgment, counsel addressed me on a number of other issues and filed helpful written arguments. Four points were raised as follows:

- (i) apportionment between defendants or contribution;
- (ii) rate of interest;
- (iii) duration of interest; and
- (iv) costs.

I have considered the competing arguments and my conclusions are as follows:

[100] On the facts I have found, the relationship between the first and second defendants and third defendant is several as opposed to that of joint tortfeasors. I have not found a common design between them, see *Sea Shepherd UK v Fish and Fish Ltd* [2015] UKSC 10. As such it is appropriate to apportion liability, see *Nationwide Building Society v Dunlop Haywards (DHL) Ltd and Cobbetts (a firm)* [2009] EWHC 254 Comm. The outcome of any apportionment depends on the facts of this case. Having considered all of the circumstances I consider that a 50/50 apportionment is appropriate to reflect the different torts which occurred at different times.

[101] I agree that an interest rate of 8% is too high. The appropriate figure is 4% in this type of case. I am also going to allow for interest from when the cause of action arose in July 2007.

[102] This was a difficult case which required the court to hear substantial evidence in order to resolve factual disputes and to consider complicated legal arguments. Costs will follow the event on the basis of the findings I have made. I make no other order having considered the submissions of the third named defendants.

[103] In summary, the plaintiffs are entitled to recover £245k against the first and second named defendants on a joint and severable basis plus costs and interest on that amount. They can recover £49k plus costs and interest on that amount against the third named defendants. This takes into account apportionment between the defendants and the reduction for contributory negligence which applies against the third defendants only.